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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-762

BETTY RUTH STANLEY, MARY ANN SHEFFIELD, SANDRA ELAINE ASHLEY, LLOYD DEAN SHEFFIELD, HUDSON ASHLEY, and JOSEPH THOMAS WILSON,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Question Presented	3
Statutory Provisions	4
Argument	4
Conclusion	5
Certificate of Service	6

APPENDIX

Summary Adjudication by the United States Court of Appeals for the Fifth Circuit	1a
Denial of the Motion for Rehearing	2a
Omnibus Crime Control & Safe Streets Act of 1968	3a

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OPINIONS BELOW

Petitioners pray that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit entered in the above-styled case on October 1, 1975. The per curiam affirmation on October 1, 1975, of the petitioners appeal by the Court of Appeals for the Fifth Circuit is set out in the Appendix, infra at 1a. A timely motion for rehearing was denied by the United States Court of Appeals for the Fifth Circuit on October 29, 1975, the mandate being issued November 6, 1975.

JURISDICTION

The opinion and judgement of the United States Court of Appeals for the Fifth Circuit was entered October 1, 1975. A timely motion for rehearing was denied October 29, 1975. This court has jurisdiction under 28 U.S.C. §1254.

STATEMENT OF THE CASE

Hudson Ashley, Joseph Thomas Wilson, Betty Ruth Stanley, Mary Ann Sheffield, Sandra Elaine Ashley, and Lloyd Dean Sheffield, the petitioners in this matter, were indicted along with thirty-one (31) other persons for violating 18 U.S.C. §371 [Conspiracy to commit offense or to defraud the United States] and 18 U.S.C. §1955 [Prohibition of illegal gambling business] on February 18, 1975, following a trial before the Honorable Newell Edenfield, District Judge of the United States District Court, Northern District of Georgia. All petitioners were found guilty as charged.

During the course of the trial, reference was made by a Federal Agent to telephone conversations which were intercepted. Throughout the course of the trial, parts of the intercepted communications were read into the record.

In November, 1971, Special Agent Donald P. Burgess obtained an order from United States District Judge Newell Edenfield, authorizing the Federal Bureau of Investigation to intercept communications on certain telephones. The application for such an order had been submitted by J. Robert Sparks, Attorney for the United States, and identified Acting Assistant Attorney General Henry Petersen as the person authorizing Mr. Sparks to make such application.

Judge Edenfield's order also identified Acting Assistant Attorney General Petersen as the person who authorized Mr. Sparks to make the application.

In fact, Acting Assistant Attorney General Petersen was not the one who authorized Mr. Sparks to make the application. It was Attorney General John Mitchell who directed that the application be made. The Attorney General had initialed a memorandum dated November 23, 1971, which was directed to Acting Assistant Attorney General Petersen. Pursuant to this memorandum, Petersen signed and sent a letter to Mr. Sparks directing him to make an application for an order authorizing the Federal Bureau of Investigation to intercept wire communications.

On June 12, 1973, Judge Edenfield granted defendants Motion to Suppress. The result of this was that Judge Edenfield denied the government the right to use evidence which they obtained by means of intercepting telephone communications. Judge Edenfield's decision was reversed by the United States Court of Appeals for the Fifth Circuit and a petition for rehearing was denied. It is this failure to suppress the wire tap interceptions that is being appealed.

QUESTION PRESENTED

Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, requiring the Attorney General or his special designate to approve the submission of a wire tap application, was fully and adequately complied with when "Acting" Assistant Attorney General Petersen authorized the wire tap application instrumental in petitioners' convictions.

STATUTORY PROVISIONS

Statutory Provisions involving Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520 are set forth in their entirety in the appendix, infra at 3a et seq.

ARGUMENT

An application for an order to intercept telephone communications, made to a federal district court is invalid when it identifies as the authorizing agent an individual who was not granted such authority by Congress.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 specifically requires the Attorney General or a specially designated Assistant Attorney General to approve the submission of a wire tap application to the appropriate district court. The patent fact of the case presented is that the Attorney General or Assistant Attorney General did not authorize, by signature, the herein presented application. It was approved by a "nearly" and "expectant" Assistant Attorney General; one who was not officially appointed but who expected soon to be an Assistant Attorney General.

The court, in *U.S. vs. Robertson*, 504 F. 2d 289 (5th Cir. 1974), *cert. denied* 43 U.S. Law Week 3547, the decision relied upon by respondent, seems to have held that one who is an "Acting" Assistant Attorney General is substantially equivalent to a full fledged Assistant Attorney General and hence Title III was substantially complied with. Petitioners argue that these positions are not equivalent. Congressional legislative expressions, especially in the criminal justice field, are to be strictly construed. Such a construction necessarily

leads to the conclusion that only those senior Justice Department officials who have successfully completed the administrative screening process and have thereby become full time (versus temporary) Assistant Attorney Generals were intended by Congress to possess the authority to approve a wire tap application.

Petitioners further argue that the Supreme Court's holding, in *U.S. vs. Chavez*, 416 U.S. 562 (1974), that an authorization is sufficient if "on its face" it identifies an official who is statutorily empowered to make such an application regardless of the correctness of that identification, supports their position. If a wire tap application sufficient "on its face" is legally required to support such an application, then conversely an application not sufficient "on its face" cannot support such an application. Since in the application presented, a party specifically directed by Congress to authorize wire tap applications did not do so, the evidence gained thereby is required to be suppressed. *U.S. vs. Giordano*, 416 U.S. 505 (1974).

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that this court grant their petition for certiorari.

/s/_____
J. M. SALOME

/s/_____
ROBERT S. WINDHOLZ

CERTIFICATE OF SERVICE

I, JOSEPH M. SALOME, a member of the Bar of the United States District Court for the Northern District of Georgia and of the Fifth Circuit Court of Appeals, do hereby certify that I have this day served a copy of the Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals upon counsel for the United States of America, by causing copies of same to be deposited in the United States mail with sufficient first-class air mail postage thereon and properly addressed to:

The Solicitor General of the United States
Department of Justice, Room 5612
Washington, D. C. 20530

Mervin Hamburg
c/o T. George Gilinsky
P. O. Box 899
Ben Franklin Station
Washington, D. C. 20044

This 26th day of November, 1975.

/s/ _____
JOSEPH M. SALOME

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 75-2008
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BETTY RUTH STANLEY, MARY ANN SHEFFIELD, SANDRA ELAINE ASHLEY, LLOYD DEAN SHEFFIELD, HUDSON ASHLEY, and JOSEPH THOMAS WILSON,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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(**October 1, 1975**)

Before GEWIN, GOLDBERG and DYER, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21.[1] *See* Iannelli v. United States, 1975, U.S. , S. Ct. , 43 L.Ed 2d 616; United States v. Robertson, 5 Cir. 1974, 504 F.2d 289.

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

(Filed in U.S. Court of Appeals Oct. 29, 1975,
Edward W. Wadsworth, Clerk.)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. S 75-2008

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BETTY RUTH STANLEY, MARY ANN SHEFFIELD, SANDRA ELAINE ASHLEY, LLOYD DEAN SHEFFIELD, HUDSON ASHLEY, and JOSEPH THOMAS WILSON,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING

(OCTOBER 29, 1975)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec.
2510. Definitions.
2511. Interception and disclosure of wire or oral communications prohibited.
2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.
2513. Confiscation of wire or oral communication intercepting devices.
2514. Immunity of witnesses.
2515. Prohibition of use as evidence of intercepted wire or oral communications.
2516. Authorization for interception of wire or oral communications.
2517. Authorization for disclosure and use of intercepted wire or oral communications.
2518. Procedure for interception of wire or oral communications.
2519. Reports concerning intercepted wire or oral communications.
2520. Recovery of civil damages authorized.

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection

between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 212.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico,

or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence

activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213, and amended Pub.L. 91-358, Title II, § 211(a), July 29, 1970, 84 Stat. 654.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510

(obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketerring enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) Any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral

communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 216, and amended Pub.L. 91–452, Title VIII, § 810, Title IX, § 902(a), Title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub.L. 91–644, Title IV, § 16, Jan. 2, 1971, 84 Stat. 1891.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained

knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 217 and amended Pub.L. 91–452, Title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the

authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception un-

obstrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

> (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this

chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an

order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the

party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an

order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218 and amended Pub.L. 91-358, Title II, § 211(b), July 29, 1970, 84 Stat. 654.

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-762

BETTY RUTH STANLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that conversations recorded as a result of a wire interception should have been suppressed.

Following a non-jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of conspiring to engage in and engaging in an illegal gambling operation, in violation of 18 U.S.C. 371 and 1955. Petitioners were sentenced as follows: Betty Ruth Stanley, three months' imprisonment and a probation term of 33 months; Mary Ann Sheffield, Sandra Elaine Ashley, and Joseph Thomas Wilson, six months' imprisonment and a probation term of 30 months; Hudson Ashley, ten years' imprisonment and a $10,000 fine; and Lloyd Dean Sheffield, three years' imprisonment. The court of appeals affirmed without opinion (Pet. App. 1a).

At trial, the government introduced portions of intercepted telephone conversations which incriminated petitioners. The intercept had been conducted pursuant to an order of a district judge obtained upon an application signed by Acting Assistant Attorney General Henry Petersen. The application had been personally reviewed by Attorney General John Mitchell, however, and, as petitioners admit (Pet. 3), the Attorney General had approved the application by a signed memorandum.

Petitioners nonetheless contend that the evidence obtained by the interception should be suppressed.[1] But since it is undisputed that the Attorney General actually authorized the application at issue here, it cannot be said that there was a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures * * *." *United States* v. *Giordano*, 416 U.S. 505, 527. In *United States* v. *Chavez*, 416 U.S. 562, 571-572, the Court said:

> Failure to correctly report the identity of the person authorizing the application * * * when in fact the Attorney General has given the required preliminary approval to submit the application, does not represent a similar failure [as in *Giordano*] to follow Title III's precautions * * *.
>
> * * * Where it is established that responsibility for approval of the application is fixed in the Attorney General * * * compliance with the screening

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[1]Review of the same contention was declined in *Vigi* v. *United States*, No. 75-101, certiorari denied, October 20, 1975. See also *Joseph* v. *United States*, No. 75-600, *Ganem* v. *United States*, No. 75-611, and *Lawson* v. *United States*, No. 75-659, petitions for writs of certiorari pending in which this issue is also raised.

requirements of Title III is assured, and there is no justification for suppression.[2]

See *United States* v. *Robertson*, 504 F.2d 289 (C.A. 5), certiorari denied, 421 U.S. 913 (cited by the court of appeals (Pet. App. 1a)).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

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[2]Although it is not material to the disposition of this case, we do not agree with petitioners' premise that an Acting Assistant Attorney General may not, when specially designated under 18 U.S.C. 2516(1), lawfully authorize an application for an intercept order. Cf. *United States* v. *Pellicci*, 504 F.2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122.

[3]In *Robertson*, the Fifth Circuit considered the identical issue that is raised in the instant case. It correctly concluded (504 F.2d at 292) that "the congressional intent is satisfied when the head of the Justice Department personally reviews the proposed application and determines that the situation is appropriate for employing this extraordinary investigative measure."